RE TAN SRI KISHU TIRATHRAI; EX P AFFIN BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL ALIM ABDULLAH JC
[BANKRUPTCY NO: D3-29-53-2003]
17 NOVEMBER 2006

BANKRUPTCY: *Receiving and adjudication orders - Appeal against - Proof of debt - Requirement of - Whether manifestly absent - Whether court satisfied with proof of petitioning creditor's debt - Whether petition should stand dismissed - Whether decision of SAR could not be upheld or endorsed - Whether receiving and adjudication orders set aside - Bankruptcy Act 1967, s. 6(2), (3) - Bankruptcy Rules 1969, r. 122*

BANKRUPTCY: *Petition - Creditor's petition - Proof of debt - Requirement of - Whether manifestly absent - Whether court satisfied with proof of petitioning creditor's debt - Whether petition should stand dismissed - Whether decision of SAR could not be upheld or endorsed - Whether receiving and adjudication orders set aside - Bankruptcy Act 1967, s. 6(2), (3) - Bankruptcy Rules 1969, r. 122*

The judgment debtor herein filed a notice of appeal against the decision of the senior assistant registrar who, on 11 May 2005, granted receiving and adjudication order against him. The judgment creditor submitted that in view that all the necessary papers were in order, the receiving order and adjudication order ought to be maintained and the judgment debtor's appeal be dismissed. The issue that arose was whether at the hearing of the creditor's petition, the petitioning creditor must prove the debt. The judgment debtor emphasized and gave prominence to the express provision of s. 6(2) of the Bankruptcy Act 1967.

Held (allowing the appeal with costs):

(1) Beyond that as submitted by counsel for the judgment creditor, it was mandatory for the court to nevertheless require proof of the debt of the petitioning creditor. That being manifestly absent, it occasioned an injustice that resulted in the impugned orders of the senior assistant registrar. Rule 122 of the Bankruptcy Rules 1969 expressly provides for the personal attendance of the petitioning creditor and of the witnesses to prove the debt and an act of bankruptcy or other material statements upon the hearing of the petition may

A if the court shall think fit be dispensed with. The above clearly favour a determination that at the hearing, the petitioning creditor had to prove the debt. The Bankruptcy Court was under a responsibility and was obliged to be satisfied by evidence of the debt.

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(2) The decision of the senior assistant registrar could not be upheld or endorsed. The petition should stand dismissed in line with s. 6(3) of the Bankruptcy Act 1967 wherein this court was not satisfied with the proof of the petitioning creditor's C debt, and it followed that the receiving order and adjudication order be and hereby set aside. Further, this court found no express power therein to permit judgment creditor's request for remission of this matter to the senior assistant registrar for a fresh rehearing of the creditor's petition. There were clear D fundamental defects in the proceedings before the senior assistant registrar. The request was therefore declined.

Case(s) referred to:

Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511; [1985] CLJ 122 SC ***(refd)***

E *In Re A Debtor, Ex Parte Debtor (No 591 of 1934) [1935] 1 Ch 353* ***(refd)***

J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 CA ***(refd)***

Low Mun v. Chung Khiaw Bank Ltd [1987] 2 CLJ 400; [1987] CLJ (Rep) 172 SC ***(refd)***

F *Michael Chong Ngian Fong v. Syarikat Fong Sam Timber & Anor [1977] 1 MLJ 263* ***(refd)***

Re A Debtor, Ex Parte The Debtor v. Scott and Another [1954] 3 All ER 74 ***(refd)***

Re A Debtor (7 of 1910) [1910] 2 KB 59 ***(refd)***

Re Lindsay, Ex Parte Lindsay [1874] LR 19 Eq 52 ***(refd)***

G *Re Loh Kok Huoh, ex p Ban Hin Lee Bank Bhd [1991] 3 CLJ 1817; [1991] 3 CLJ (Rep) 183 HC* ***(refd)***

Re Pg Ahmad Pg Hj Abdullah, ex p Oriental Bank Bhd [1991] 3 CLJ 2899; [1991] 3 CLJ (Rep) 463 HC ***(refd)***

Re Purrett, Ex parte Purrett, 1895 The Law Times Report Vol LXXIII ***(refd)***

H *Re Teoh Thean Peng, ex p D & C Leasing Sdn Bhd [1993] 1 AMR 20* ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 4, 6(2), (3), 24(1), 92

Bankruptcy Rules 1969, r. 122

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Other source(s) referred to:
JH Thompson, *The Principles of Bankruptcy Law*, p 16
Williams and Muir Hunter, *The Law And Practice In Bankruptcy*, 19th edn, p 56

For the judgment debtor/appellant - T Gunaseelan; M/s Gunaseelan & Assoc
For the judgment creditor/respondent - Tharmy Ramalingam; M/s Shook Lin & Bok

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Alim Abdullah JC:

[1] There are two issues that are important yet significant for determination in this matter before this court. Its ascertainment has bearing on the prevailing practice that has hitherto been adopted by most, if not, all senior assistant registrars who hear bankruptcy petitions. The two issues can succinctly be set out as follows:

(a) that at the hearing of the creditor's petition, the petitioning creditor must prove the debt;

(b) that the receiving order and the adjudication order ought not to made simultaneously.

[2] To better understand the background to the underlying issues herein, I am mindful of setting out the chronology of events that had transpired up to the time of the hearing of the appeal that is before me now:

(a)	19.2.2002	Summary judgment entered against Judgment Debtor *vide* Kuala Lumpur High Court Suit No. D4-22-524-2001 by Deputy Registrar.
(b)	7.1.2003	Bankruptcy Notice filed against Judgment Debtor.
(c)	27.2.2003	Judgment Debtor's appeal to Judge in Chambers against summary judgment dismissed with costs.
(d)	30.4.2003	Sealed Bankruptcy Notice served personally on Judgment Debtor.
(e)	31.7.2003	Creditor's Petition filed against Judgment Debtor.

(f)	12.4.2004	Order and Notice for substituted service of Creditor's Petition granted whereby Creditor's Petition served by way of: (i) posting at Judgment Debtor's last known address on 20.4.2004; (ii) Kuala Lumpur High Court Notice Board on 20.4.2004; and (iii) Advertisement in New Straits Times on 16.4.2004.
(g)	10.6.2004	Notice Of Intention To Oppose Petition filed by Judgment Debtor (Enclosure 17).
(h)	11.6.2004	Summons in Chambers and affidavit affirmed on 10.6.2004 filed by Judgment Debtor to set aside/stay Creditor's Petition (Enclosure 19).
(i)	5.11.2004	Enclosures 17 and 19 dismissed with costs by Senior Assistant Registrar.
(j)	8.11.2004	Notice of Appeal to Judge in Chambers filed by Judgment Debtor against decision Senior Assistant Registrar dated 5.11.2004.
(k)	9.5.2005	Appeal against decision of Senior Assistant Registrar dated 5.11.2004 dismissed by Judge in Chambers with costs.
(l)	10.5.2005	Notice of Appeal to Court of Appeal filed by Judgment Debtor against decision of 9.5.2005.
(m)	11.5.2005	Receiving Order and Adjudication Order entered against Judgment Debtor by Senior Assistant Registrar.
(n)	13.5.2005	Notice of Appeal to Judge in Chambers against decision of Senior Assistant Registrar dated 11.5.2005 in granting Receiving Order and Adjudication Order filed by Judgment Debtor.

[3] It is to be noted from the above that during the ongoing progress of the appeal to the Court of Appeal by the judgment debtor against the decision of the judge dated 9 May 2002 in para (k) above, the receiving order and adjudication order were entered against the judgment debtor, which appeal by the latter is presently before me in this proceeding.

[4] Addressing the first issue that is in contention, counsel for the judgment creditor submitted that the proof of the debt is evident from the judgment dated 19 February 2002 which had formed the basis of the bankruptcy proceedings and which was annexed to the request for bankruptcy notice to be issued. Further, the act of bankruptcy was committed on 8 May 2003 when the judgment debtor failed to comply with the demand in the bankruptcy notice. And also the service of the petition was proven by the affidavit of service of one Azmi bin Mohd. Johan affirmed on 23 April 2004 which was not challenged by judgment debtor.

[5] On the facts of the above circumstances, counsel for judgment creditor stood her ground and submitted that in view that all the necessary papers are in order, therefore the receiving order and adjudication order made on 11 May 2005 ought to be maintained and the judgment debtor's appeal be dismissed with costs.

[6] On the other hand, counsel for the judgment debtor emphasised and gave prominence to the express provision of s. 6(2) of the Bankruptcy Act 1967.

[7] It is reproduced below:

> 6 Proceedings and order on creditor's petition
>
> (1) A creditor's petition shall be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts, and shall be served as prescribed.
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> (2) **At the hearing** the court **shall** require **proof** of:
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> (a) the **debt of the petitioning creditor**; and
>
> (b) the **act of bankruptcy** or, if more than one act of bankruptcy is alleged in the petition, some one of the alleged acts of bankruptcy; and
>
> (c) if the debtor does not appear, the service of the petition,
>
> and if satisfied with the proof may **make a receiving** order in pursuance of the petition.

A (3) If the **court is not satisfied with the proof of the petitioning creditor's debt** or of the act of bankruptcy or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may **dismiss the petition.** (emphasis added).

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[8] The provision is clear. At the hearing, the court shall require proof of the debt of the judgment creditor. In other words what counsel here is submitting is that beyond that as submitted by counsel for judgment creditor, it is mandatory for the court to C nevertheless require proof of the debt of the petitioning creditor. That being manifestly absent, it has occasioned an injustice that resulted in the impugned orders of the senior assistant registrar.

[9] The ground advanced by counsel for the judgment debtor is D seen in some compelling and well founded authorities. It is well reasoned where seen in *Re Teoh Thean Peng, Ex Parte D & C Leasing Sdn. Bhd.* [1993] 1 AMR 20 where Dato' KC Vohrah J (as he then was) drew attention that the affidavit of verification on which the petition is filed cannot be used upon the hearing of E the bankruptcy petition. This observation is self explanatory and one based on established English authorities which laws, namely the Bankruptcy Act 1952 (now replaced by the Insolvency Act 1986), and our Bankruptcy Act 1967 is in *pari materia*, the latter modeled on the former. Our Malaysian case law cited herein finds F support in the English authority of *Re A Debtor* (7 of 1910) [1910] 2 KB 59 where Vaughan Williams LJ in stating that the affidavit is in effect for the purpose of getting leave to file the petition in bankruptcy, went on the say:

G The affidavit which is used at the time when the petition is filed is an affidavit which cannot be used upon the hearing of the bankruptcy petition.

[10] A very relevant passage from Williams and Muir Hunter on *The Law And Practice In Bankruptcy* (19th edn) at p. 56 will make H plain and illuminate the essential point in the proof of debt of the petitioning creditor:

Since bankruptcy affects not only the debtor and his creditors, but also the general public, the court has a duty to see that all the requirements of the Act and Rules have been observed (*Re a* I *Debtor* (591 of 1934) 1935 Ch 353). The petitioning creditor's

debt must be proved *not only* to have existed *at the date of the act of bankruptcy and at the time of the presentation of the petition, but also* to exist *at the hearing and down to the making of the receiving order.* (emphasis added).

[11] The obvious logical basis seen in this requirement is that before the hearing of the petition, the judgment creditor may have sold off the security that is held by them resulting in the debt having fallen below the threshold of RM30,000, which minimum sum must be owed before a receiving order can be made. The judgment debtor may in another situation had made payment similarly bringing it to below threshold limit.

[12] In *Re Purrett, Ex. Parte Purrett,* 1895 The Law Times Report Vol. LXXIII, Williams J states the established practice of the Bankruptcy Court:

The personal attendance of the petitioning creditor and of the witnesses to prove the debt and act of bankruptcy, or other material statements, upon the hearing of the petition, may, if the court shall think fit, be dispensed with. That rule contemplates the attendance of the petitioning creditor wholly irrespective of whether he is or is not a witness to prove the act of bankruptcy or the debt of the petitioning creditor, and his attendance is for the purpose of enabling questions to be put to him unless some good reason exists for his attendance being dispensed with.

If the petitioning creditor is in attendance, the debtor has a right to question him unless the "court shall think fit (that the personal attendance should) be dispensed with." ...

It should be understood, where the debt is based on a judgment verified by the affidavit of the petitioning creditor, that does not deprive the debtor of the right to cross-examine unless and until he gives evidence displacing the judgment. The receiving order was wrong.

[13] In another case of *In Re A Debtor, Ex Parte Debtor (No 591 of 1934)* [1935] 1 Ch 353 at pp. 356 and 357 Lord Hanworth MR found fitting to say the following principle relevant to this point at issue:

In all cases the Court would want to be satisfied that the terms of s. 5, sub-s. 2, of the Bankruptcy Act 1914, have not been overlooked, that section saying that: 'At the hearing the court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one

act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may make a receiving order in pursuance of the petition.'

And r. 171 of the Bankruptcy Rules, 1915, carries out the terms of s. 5, sub.s-2, because it provides that 'On the appearance of the debtor to show cause against the petition, the petitioning creditor's debt, and the act of bankruptcy, or such of those matters as the debtor shall have given notice that he intends to dispute, shall be proved ...'.

Now, I have specifically called attention to these rules, because on July 13 there was filed a notice to dispute, and that notice to dispute in terms stated that there was a stay of execution in respect of the Louis Sherwood debt, and that with regard to the Dunn Trust, Ld., only 1301 was due. Inasmuch as the note is not perfect I will say no more, but I do call the attention of the Registrar and of all other persons to the importance of observing and complying with s. 5, sub.s-2, and r. 171, and of making a note that they have been complied with.

I also call attention to the fact that an admission is not sufficient in bankruptcy proceedings; the Court is acting not merely inter partes but in the public interest, and that being so the Court has a public function and duty to perform and is bound to perform it.

[14] Suffice to quote another case of *Re A Debtor, Ex Parte The Debtor v. Scott and Another* [1954] 3 All ER 74 where Sir Raymond Evershed MR had this to say:

Section 5(2) provides:

At the hearing (of the petition) the court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and if satisfied with the proof, may make a receiving order in pursuance of the petition. It is well known that bankruptcy is a matter which not only affects the debtor and his status, but it also affects the general public, and the court, therefore, has a duty to see that all the requirements, either express or implicit in the statute, have been strictly observed. *The statute itself makes it quite plain that the petitioning creditor's debt, ie, the debt on which the petition expresses itself as founded, must be proved to be existing and have the quality and character mentioned in s. 4, both at the date when the petition was presented, and at the date of the hearing* ... I think there is a further requirement which emerges

> from what has been called the *common law of bankruptcy* ie, the rules or principles which the courts have held to be applicable in bankruptcy proceedings, though in terms this requirement does not appear to be expressly stated in statute. The requirement, in my judgement, is that the petitioning creditor's debt must also be shown to have existed and to have the necessary character and quality state in s. 4 at the date of the act of bankruptcy as well as at the dates of the presentation and hearing of the petition. (emphasis added).

(Section 5(2) referred to above is in *pari materia* with s. 6(2) of the Bankruptcy Act 1967).

[15] Under our r. 122 of the Bankruptcy Rules 1969 expressly provides for the personal attendance of the petitioning creditor and of the witnesses to prove the debt and an act of bankruptcy or other material statements upon the hearing of the petition may if the court shall think fit be dispensed with.

[16] The above, all clearly favour a determination that at the hearing of the petition, the petitioning creditor has to prove the debt. The fact that the judgment debtor may not have raised the issue at the hearing is of no consequence. The bankruptcy court is under a responsibility and is obliged to be satisfied by evidence, of the debt, and this is so even if the judgment debtor does not appear at the hearing. In *The Principles of Bankruptcy Law* by J.H. Thompson, at p. 16, the author states:

> At the hearing, the petitioning creditor must prove the debt, service of the petition on the debtor, and the act of bankruptcy, and the court may thereupon make a receiving order (B.A., s. 3). If the Court is not satisfied with the proof of any of these matters, or is satisfied by the debtor that he is able to pay the debt, or that for other sufficient cause no order ought to be made, it may dismiss the petition (B.A., s. 5).

[17] These are also several of the decisions of our courts which had made similar observations on the requirement of proof of the debt at the date of hearing of the petition.

[18] In *Re Loh Kok Huoh, Ex Parte Ban Hin Lee Bank Bhd* [1991] 3 CLJ 1817; [1991] 3 CLJ (Rep) 183 wherein Mohamed Dzaiddin J (as he then was) observed:

> Thirdly, in my opinion, where the debtor on which the bankruptcy petition is founded has, by the date of the hearing of the petition, been substantially reduced, this court can still make a receiving order unless the debt was less than the statutory minimum of *$2,000 since on the true construction of s. 6(2) read with s. 5(1)(a) of the Act it is necessary to prove that a debt exceeding the statutory minimum of $2,000 is still due and owing to the bank at the date of the hearing of the petition* (see *Re Patel* (A debtor [1986] 1 All ER 522)). (emphasis added).

[19] It is also held in the case of *Michael Chong Ngian Fong v. Syarikat Fong Sam Timber and Anor* [1977] 1 MLJ 263 where Ajaib Singh J (as he then was) also pronounced on the need to satisfy the same requirement.

[20] It seems all too clear that the statutory requirement as to proof of debt is procedural in nature. In deciding this said issue it is most essential that the court accords the provision under the Act a strict construction. And bankruptcy proceedings being quasi-penal in nature, it is thus imperative that the procedural requirements are strictly complied with (see *Re Pg Ahmad bin Pg. Haji Abdullah, Ex Parte Oriental Bank Bhd.* [1991] 3 CLJ 2899; [1991] 3 CLJ (Rep) 463; *J. Raju a/l M. Kerpaya v. Commerce International Merchant Bankers Berhad* [2000] 3 CLJ 104).

[21] It is worthwhile to note what Mohamad Azmi SCJ (as he then was) had said in *Low Mun v. Chung Khiaw Bank Ltd.* [1987] 2 CLJ 400; [1987] CLJ (Rep) 172:

> As to the principle of the construing bankruptcy notices, we agree with the view that since bankruptcy is entirely a creation of statute law, the rule of strict construction should be applied to the legislative words creating the bankruptcy.

[22] Likewise Eusoffe Abdoolcader SCJ (as he then was) in *Foo Loke Ying and Anor v. Television Broadcasts Ltd. & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122 too said:

> The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded ... .

[23] Now, adverting to the second issue, the question at hand is whether the receiving order and the adjudication order ought not to made simultaneously.

[24] It can be seen from the reading of Part I of the Bankruptcy Act 1967 in relation to proceedings from the act of bankruptcy to discharge, it is envisaged that the court may on a bankruptcy petition being presented and upon its proof make an order, which order is called the receiving order (see s. 4 and s. 6(2)). Further, s. 24(1) makes provision for the making of an adjudication order where, after a hearing that it is clear that the judgment debtor has no property to satisfy the debt which is proved at the hearing. This appears to be the scheme of the Act.

[25] Section 24(1), Bankruptcy Act 1967 provides:

> At the time of making a receiving order the Court shall adjudge the debtor bankrupt **unless the debtor can show** to the satisfaction of the Court that he is in no position to offer a composition or make a scheme of arrangement satisfactory to his creditors. (emphasis added).

[26] Upon a reading of this section, it appears that it anticipates a hearing or deliberation by the court on the ability of the judgment debtor to pay his debt before he is to be adjudged a bankrupt. Due consideration has to be given since his assets have to be drawn up or marshaled and which would truly indicate his ability to satisfy the debt. A receiving order made would necessarily result in an investigation into the assets and liabilities of the judgment debtor.

[27] The scheme of the bankruptcy legislation is not to root out and devastate the judgment debtor. J.H. Thompson in "*The Principles of Bankruptcy Law*" stated the main objects of bankruptcy laws as being:

> (1) to secure an equitable distribution of the property of the debtor among his creditors according to their respective rights against him;
>
> (2) to relieve the debtor of his liability to his creditors, and to enable him to make a fresh start free from the burden of his debts and obligations; and

A (3) to protect the interests of the creditors and the public by providing for the investigation of the conduct of the debtor in his affairs and for the imposition of punishment where there has been fraud or other misconduct on his part.

B **[28]** Upon a further scrutiny of s. 24 it is evident that the making of an adjudication order does not necessarily follow the receiving order so made. If the debtor shows to the satisfaction of the court that he is in a position to offer a composition or make a scheme of arrangement satisfactory to his creditors, then an adjudication order will not be made.

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[29] Addressing the issue of concern by counsel for the judgment debtor as to his contention that a receiving order ought not to have been made simultaneously to that of the making of adjudication order, one has to allude to the facts of this instant D case before me. Having examined all that are relevant, I found nothing that the judgment debtor had proffered a scheme that is satisfactory to his creditors that would have precluded the making of an adjudication order.

E **[30]** However, it must be emphasised here that this second issue is of no consequence to this appeal before me as it has been superceded by the affirmative finding of this court that by reason of there being no proof of the debt at the hearing of the creditor's petition, a requisite thereat, and which is an obligation that has F to be discharged by the judgment creditor at the hearing of the creditor's petition.

[31] In my opinion the decision of the senior assistant registrar cannot be upheld nor endorsed. In conclusion, I would commit to G mention the case of *Re Lindsay, Ex Parte Lindsay* [1874] LR 19 Eq 52 which decided that at the hearing of a bankruptcy petition, even though the respondent has given no notice of his intention to show cause against the petition, and does not appear, the allegations contained in the petition must be supported by further H evidence than the common affidavit. That affidavit is made only for the purpose of justifying the sealing of the petition. Sir James Bacon CJ had this to say (at p. 54):

> In my opinion this adjudication cannot be sustained, for the provisions of the statute have not been regarded. The petition I alleged the commission of an act bankruptcy in the words of sect. 6, sub-sect. 2, and it was accompanied by an affidavit verifying generally the truth of the allegations according to the Form No.

> 11. The reason for requiring that affidavit to be made is, that it would not be right that the petition should be received by the Registrar without it; its only purpose is to justify the receiving of the petition and the sealing of a copy for serving, and it has nothing to do with the provision of sect. 8 of the Act, **that the Court at the hearing is to require proof of the act of bankruptcy alleged in the petition** ...
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> The Court had before it no proof of the statutory requisites to the making of an adjudication, for a merely general affidavit proves nothing. By it the petitioner only pledges himself that he will adduce at the hearing the proof required by the Act. The affidavit is sufficient for the purpose of the sealing of the petition, but that is all ...
>
> The Deputy-Registrar was probably misled by the non-appearance of the debtor into adopting the first formal affidavit as conclusive proof of the requisites to an adjudication. On this ground, therefore, the order cannot be sustained, and the adjudication must be annulled. (emphasis added).

[32] The appeal herein must be allowed with costs. The petition shall stand dismissed in line with s. 6(3) of the Bankruptcy Act 1967 wherein this court is not satisfied with the proof of the petitioning creditor's debt, and it follows, the receiving order and adjudication order be and are hereby set aside.

[33] Counsel for the judgment creditor had then requested for the remission of this matter to the senior assistant registrar for a fresh rehearing of the creditor's petition. She relies on s. 92 of the Bankruptcy Act 1967. This court finds no express power therein permitting it to do so. Above all, it is the court's observation and finding that there are clear fundamental defects in the proceedings before the senior assistant registrar. The request was therefore declined without hesitation.